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"Policy" in Judicial Decisions*

Albert Tate, Jr.**

Upon entering practice the lawyer is usually confronted with a mass of routine matters and of litigation involving chiefly application of settled principles to disputed facts. Thus meeting comparatively few situations where policy as such plays an important consideration in the handling of their cases, many practical practitioners tend to regard rather contemptuously the influence upon judicial decisions ascribed to "policy" by law professors. ("Policy" considerations I define for purposes of this paper as those based upon social or practical or equitable reasons why a court should decide a present controversy in a given manner; as contrasted with purely "legal" or logomachical arguments based upon the wording of a statute or the holding of a precedent and reasoning therefrom.)

But the courts, and particularly the appellate courts, receive the borderline cases of many law practices. Although a great preponderance of an appellate judge's caseload — perhaps 90 or 95% or more — similarly involves routine application of precedent and word-logic,¹ fairly soon in the life of the new judge the moment comes when he realizes that there are some cases in which he (or no one) can find "the" law — that is, legislative enactments or sufficiently related decisions by his own or other courts that definitely indicate which of two contrary reasonable positions should have favorable judgment upon the facts found to be correct. It is then for this new judge an interesting experience to have policy arguments re-emerge as a factor in the resolution of some legal controversies.

Suppose, for instance, he finds that his own court or the reported decisions of the other courts of his state have never considered the question now before him, but that in other jurisdictions the various lines of jurisprudence provide two or more opposing but equally logical resolutions of the issue. What

*This article is the substance of a talk given in May 1958 at the annual Law Review-Moot Court banquet of the LSU Law School.

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1. In his noted article, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 941 (1923), Dean Pound stated that the "bulk" of appellate cases merely "repeat or ring insignificant changes upon familiar states of fact."

should the judge do then? Should he follow the decisions of the states closest to him? Of the greater number of states? Does he flip a coin? Should he count the number of cases or of pages in the opposing briefs, and decide in favor of the party with the more numerous citations or pages? Should he instead rest his decision on some apt excerpt from some decision, even though in the context of its own facts it is completely inappropriate to the present legal question?

No. I think he properly should decide on the basis of what is best for the community as a precedent and of what impresses him as the fair solution of the question for the parties concerned: that is, on the basis of policy considerations.

The case of *Sanders v. Sanders*² may illustrate the use of policy in the decisional process, in the absence of guiding precedent.

In this suit the interests of two brothers were opposed. The assets of their deceased mother's succession, namely the proceeds from the sale of the family home, were to be distributed. The defendant brother sought to have recognized as a debt of his mother's succession, to be paid before division of the net proceeds among the co-heirs, his claim for reimbursement of the \$313 advanced by him to have their mother buried after her death in 1950. The plaintiff brother opposed payment of these funeral expenses on the ground that such claim, first judicially asserted in the 1954 succession and partition proceedings, had prescribed; having been judicially demanded more than three years after the debt was incurred.

While under our Civil Code open accounts ordinarily prescribe in three years (Civil Code Article 3538), other code provisions maintain funeral expenses as a highly privileged charge upon the assets of the estate payable even before many of the debts contracted by the deceased person himself (Civil Code Articles 3191, 3252, 3254). The legislature has not provided that prescription does or does not run against such a charge upon the estate; nor prior to the *Sanders* decision had the question ever been considered in any published Louisiana opinion.

We felt there was much logic to the position of both parties. Perhaps there was no reason why funeral expenses along with other accounts should not prescribe in three years. On the other

2. 85 So.2d 61 (La. App. 1955).

hand, funeral debts are a charge upon the assets of the estate; maintaining these assets undivided could be considered a continuing recognition of the existence of the privileged debts impregnating these assets. Funeral charges might thereby be distinguishable from ordinary open accounts. Or perhaps the right to compel the coheirs to pay such privileged funeral expenses from the assets of the estate prior to its division was a personal action to which no prescription applied except that set forth by Civil Code Article 3544: "In general, all personal actions, except those enumerated, are prescribed by ten years." Thus, relying upon logical reasoning alone we could not with satisfying certainty conclude that the result urged by either of the two opposing parties was necessarily preferable or correct.

Insofar as the equities of the case were concerned, I think that almost everybody can agree that judgment should be in favor of the heir who paid the parent's funeral expenses with the expectation that such would be reimbursed when the parent's estate was liquidated; and against the coheir who wished to receive a share of his mother's assets without contributing to the cost of her burial.

But were we to hold that a coheir's right of reimbursement was prescribed only by *ten years'* inaction, unfortunate social consequences might ensue. This privilege for funeral expenses need not be recorded to be effective (Civil Code Article 3276), and a holding that this unrecorded privilege was effective against property for ten years might in the future cause complications in the sale of property,³ as well as injustice to purchasers acquiring several years later (perhaps through intervening conveyances) with the not unreasonable expectation that any coheirs in the chain of title had paid for the burial of their own immediate ancestor.

Ultimately, we concluded that not only the equities of the present case but also the needs of the community at large were better to be served by a holding that funeral expenses did not prescribe while remaining as a legal charge against the assets of an undivided estate (although recognizing that the coheirs or other persons might be estopped to claim them where a third party purchaser was prejudiced by an unreasonable delay in

3. Every time the sale of succession property appeared during the last ten years of a chain of title, the intending purchaser might be forced to ascertain independently whether the funeral expenses were fully paid.

asserting or recording the privilege). Within the usual behavior of the community, coheirs often maintain an estate's property in indivision and await the final liquidation of the estate for final settlement of their mutual accounts with regard thereto. We felt that it would be unwise as a guide to future behavior to require a coheir or other who had expended money for funeral expenses to file a suit against or to force a partition of the estate within three years when there are often sound reasons to delay final settlement until later (such as in the *Sanders* case, where the family home was maintained unsold for four years after the mother's death and until her aged husband also died, in order to provide a shelter for him until his death).

We therefore held that the defendant coheir was entitled to reimbursement of the funeral expenses.

We had the duty to decide whether or not the defendant should receive his \$313. The statutes and precedents did not provide any determinative answer to this question, which had to be answered "Yes" or "No" by us. In the absence of definitive guide by the legislature or of prior judicial decision, an attempt to decide the question without considering the equities and the practical social implications of our decision would in my opinion have been as irrational as deciding by a throw of the dice. Legal rules and procedures are designed to aid human societies obtain justice, not to exist as abstract theory independent of human beings and social considerations.

Now the report of the *Sanders* case does not take more than one page, nor (for reasons of brevity) does it explicitly treat of the policy considerations that we weighed and that motivated the final decision of what was an open question with two opposing logical answers suggested by the statutes. But I think it illustrates how the courts must sometimes use policy as the most rational basis upon which to select from the conflicting statutes or precedents the rule which will (they hope) provide the wisest and most just decision.

As Justice Traynor of the California Supreme Court recently observed: "We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must

revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration.”⁴

Even in an area regulated in detail by legislation, policy may be a factor in the court’s decisional process; although the policy ascertained and applied may be that which is deemed to have been the legislature’s, rather than the court’s, conception of the wisest rule.

For example, in *State Farm Mutual Automobile Insurance Company v. Louisiana Insurance Rating Commission*⁵ the state regulatory agency had refused to permit the insurance company to charge new policyholders an initial membership fee in addition to what was denoted as the policy premium. This non-recurring initial charge was termed by the company an integral and necessary part of a plan to afford the public a 25% reduction in insurance rates by eliminating from the general rate formula the annually recurring item of 25% “production costs” (mainly, agents’ renewal commissions). The state commission charged that the company’s plan deceptively labelled what was really part of the cost of affording coverage (i.e., the premium) as a “membership fee.”

The company and the commission relied upon apparently conflicting provisions of our Insurance Code.⁶ As the company pointed out, the legislature explicitly stated that nothing in the Insurance Code “shall be construed to prohibit any insurer . . . from charging *in addition to* the premium, a separate initial membership, policy or inspection fee or other similar charge.”⁷ (Emphasis added.) But, as the commission argued, other provisions defined the premium or premium rate regulated by the commission to *include* such membership fees exacted as part of the consideration furnished for the purchase of the insurance coverage.⁸

Argued both explicitly and implicitly were policy considerations as to the merits of the company’s plan: low cost insurance by eliminating the middleman, the local insurance agency; *versus*, the danger to the public weal by the destruction of such local small-business enterprises and by the monopolistic concen-

4. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957).

5. 79 So.2d 888 (La. App. 1955).

6. LA. R.S. tit. 22 (1950).

7. *Id.* 22:1404(5).

8. *Id.* 22:5(7), 1404(6).

tration of the insurance industry into a few such gigantic economic aggregates as the insurer concerned, which might be able to freeze out smaller insurers unable to compete with what were in effect alleged to be temporarily lower rates subsidized by profits made elsewhere from enormous concentrations of capital.

However, we found that such policy arguments were beyond the scope of the court's consideration; for, as the company correctly argued, by the provision upon which it relied the legislature had explicitly stated that the Insurance Code did not (as argued by the commission, in citing other provisions thereof) prohibit approval of a membership plan such as the company proposed, the only type known to the insurance industry. The legislature having spoken, it was not for the courts to consider the wisdom of the enactment.

But although the company argued that this legislative permission likewise sanctioned in toto their plan as proposed, the provisions of the Insurance Code relied upon by the commission demonstrated to our court a general legislative policy that for such purposes as rate regulation, reserve requirements (based upon a percentage of premiums collected), gross premium taxes, and (most pertinently to the litigation) quoting a price to the public, such membership fees should be considered *part* of the premium exacted for affording coverage, rather than a charge *in addition* thereto. Accordingly, we sustained the refusal of the commission to sanction the plan as proposed, which had treated the membership fee as a charge additional to the premium.⁹ The use of the legislative policy expressed by the statute determined what we felt to be the correct among the permissible meanings reflected by the statutory words.

But, it seems to me, policy plays a more general role in judicial decisions than that so far described. Policy, in the sense of the motivating equitable and practical reasons behind the development of legal principles, plays a constant although usually imperceptible role in the decisional process. Policy, in the sense that justice is the aim and intent of all legal system and procedures, is the spirit vitalizing the letters of the law.

9. We sustained the commission's rejection of the plan as proposed, but without prejudice to the company's resubmission of a single initial membership fee plan which showed as premium the entire consideration charged to the policyholder for coverage. *State Farm Mut. Auto. Ins. Co. v. Louisiana Ins. Rat. Comm'n*, 79 So.2d 888, 897 (La. App. 1955).

The thrust of the judicial process is twofold: to obtain case by case the fairest possible solution for the litigants in each individual case; and also to provide and follow just, sensible, and predictable general rules. As a noted scholar and former jurist has stated, "In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law — that is, on grounds and by a process prescribed in or provided by law."¹⁰

The judicial decision of a legal controversy has been said to involve (1) the selection of the legal materials, that is, "finding the law"; (2) the development of the grounds of decision, that is, the interpretation of these legal materials; and (3) the application of the abstract ground of the decision to the facts of the present case.¹¹ When discretion may or must be exercised by the judge in the selection, development, and application of the legal materials, the judge will naturally tend to exercise what discretion is afforded him in favor of the result deemed by him to be more just or socially sound. Since the choice of legal materials found applicable may dictate the result, the judge in such instances will in the mental process of formulating his decision tend to choose its legal rationale by working backward from the just result, rather than by commencing from a legal premise and finding out, by Jove!, that it leads to a just result.

At the risk of superfluity, it should again be emphasized at this point that in the great bulk of cases any appellate court in the same jurisdiction will reach the same conclusion. Either both the rule of law and its application are certain; or, where the factual application of the settled legal rule is what is contested, under principles regulating the weight given to factual determinations of trial courts most appellate judges would similarly affirm or reverse.¹² The judges do not and should not dispense justice simply according to their individual notions of what is fair for the individuals concerned, or of what will in the future provide a sensible rule for the community. The justice they attempt to render must be accomplished within the framework of their judicial system and subject to the discipline of the judicial craft, which permits discretionary judicial choice only in the absence of legislative policy or of prior binding precedent or of a clear answer to the present litigation deduced either from

10. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923).

11. *Ibid.*

12. See CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164-65 (1921).

legislative provisions or prior precedent or both.¹³ These observations concerning policy considerations as a factor in judicial decisions should be read as subject to such qualification.¹⁴

In those comparatively rare instances where fairness or social utility are the touchstone of decision more than statute or prior decision, it is in the last analysis the deciding judges themselves who determine the justness of the result or the soundness of the rule. But they do so as representative voices of their generation. Individualistic and non-representative views of any participating judges as to what should constitute a fair legal disposition with relation to a given set of facts tend to be brought into conformity with the general social and moral feelings of the times by the availability of appellate review (sometimes in several layers) and by the practice of having multi-judge appellate tribunals. And whatever part policy may play in the decisional process, the final product as expressed by the rendered opinion must use normal legal reasoning; for unlike the mistakes of physicians which according to the popular saying are buried, those of appellate judges are published and perpetuated and, if unsound, soon fall prey to higher courts or the critical pens of the law reviews or both.

The importance of policy as a continuing factor in the judicial process can perhaps more easily be evaluated retrospectively than demonstrated in practice. To understand why the law through the reported cases developed in a given rather than another direction over the decades must often involve consideration of the prevalent forces, thoughts, and feelings which are then seen to have influenced the direction of the law along with that of the society of which the law was but one expression.

An illustration that comes readily to the mind of a Louisiana lawyer is the development of our mineral law. In the absence of guidance from the legislature, the judiciary was forced on a case by case basis to choose from the ancient concepts of our Civil Code those deemed to afford the most suitable and just regulation of private rights in mineral interests.

13. See, e.g., *ibid.*; Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923) (*passim*).

14. As Cardozo observed, there is a danger that a "sketch of the judicial process which concerns itself almost exclusively with the creative or dynamic element, is likely to give a false impression, an overcolored picture, of uncertainty in the law and of free discretion in the judge." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921).

The judicial characterization of the mineral interest *per se* as a servitude, as a right to go upon the land and search for oil, and hence prescriptible by ten years' non-user (rather than as a non-prescriptible ownership of subsurface property); and of the mineral royalty right as a real right running with the land, its continued existence conditioned upon the production of minerals within ten years (rather than as an imprescriptible rental charge imposed by the landowner to become operative only if mineral development take place); cannot be explained on the basis of legal history or of logomachical reasons.¹⁵ The determining and unifying principles behind the judicial choice from among contending available code concepts are found in policy considerations: the belief that the community interest is better served by legal concepts which favor landowner (and hence more local) over absentee ownership of our mineral resources,¹⁶ and which foster present development of minerals rather than the holding of mineral interests undeveloped as a long-term financial investment.

Likewise, these motivating policy considerations explain the subsequent judicial development of the mineral jurisprudence. Following *Frost-Johnson Lumber Company v. Salling's Heirs*¹⁷ (which is generally regarded as the decision finally establishing the non-ownership theory in Louisiana mineral law), one could not have predicted nor can one explain the development of our mineral law in terms of the previous application of the code concepts utilized.¹⁸ During the development of the jurisprudence results were sometimes reached which appeared inconsistent with the word-reasoning of earlier decisions.¹⁹ But viewed from the standpoint of the underlying policy reasons, the development of the mineral law was (in retrospect) fairly consistent and predictable; and eventually most verbal inconsistencies in the reasoning were rationalized and harmonized consonant with the policy-predicated results.

The social reasons which cause certain legal concepts or re-

15. DAGGETT, MINERAL RIGHTS IN LOUISIANA, chs. I, II, VI (rev. ed. 1949).

16. As Professor Daggett stated, under other theories "small holders particularly may be unprotected and led by economic stress to dispose of their most valuable possession forever for relatively small sums." *Id.* at 267.

17. 150 La. 756, 91 So. 207 (1922).

18. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 41 (rev. ed. 1949): The courts "fitted the applicable articles of the Code, discarding those in which the letter would have been against public policy and inimical to the protection of private rights."

19. See *id.* at chs. II, VI.

sults to seem logical and just in the minds of the judges may not be articulated. The comparatively recent emergence of the doctrine of contributory negligence has, for instance, been explained as an incidence of and aid to industrial development in the last century,²⁰ although it is likely that few nineteenth century judges recognized that the perceived utility and assumed fairness of the doctrine resulted more from the social climate than from historical precedent. Again, a recent brilliant study of "proximate cause" has attempted to demonstrate that the judicial use of this concept to limit or expand liability is often explained as much by unexpressed policy considerations as by reasons of logic.²¹

Even in deciding so routine a type of litigation as intersectional collisions, a certain amount of policy choice is made by the courts. The legislature has provided that under certain circumstances one vehicle has the right of way over other vehicles to proceed into an intersection; but there are also legislative provisions and other standards of reasonable care regarding look-out, speed, and control which have weight in the determination of whether one or all the drivers involved in an intersectional collision are guilty of or free of negligence or contributory negligence.

In the view of some courts and expressed by some decisions, both drivers are at fault whenever an intersectional collision occurs because the accident would not have occurred had either driver observed the other approaching the intersection. Although such a view is certainly not illogical, in recent years our court has consistently rejected such reasoning²² but has instead (with what we hope to be at least equal logic) given great weight in deciding intersectional collision damage suits to the legislative rule in favor of the driver with the right of way in accordance with what it feels to be the legislative intention and the ordinary behaviour of reasonably prudent drivers.²³

20. See, for instance, Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1956), which also discusses the social cross-currents affecting developments of the doctrine. See also 2 HARPER & JAMES, *THE LAW OF TORTS* 1197-99, § 22.1 (1956).

21. Comment, *Proximate Cause in Louisiana*, 16 LOUISIANA LAW REVIEW 391 (1956).

22. See, e.g., *Janice v. Whitley*, 111 So.2d 852, 855 (La. App. 1959). This decision cites many of the recent right of way cases rendered by the Court of Appeal, First Circuit.

23. See, e.g., *Gautreaux v. Southern Farm Bureau Casualty Co.*, 83 So.2d 667, 669 (1955): "In the everyday world, ordinarily prudent motorists on the main thoroughfare do not slow before each corner and attempt to peer down the side-streets, but instead concentrate most of their attention on the path ahead, relying

This, I submit, is a not uncommon illustration of the necessity of a court at various stages of its history to choose, from among competing rules which may with equal validity be held applicable, that general rule which will provide what the court hopes will be the fairest and wisest disposition of the present and future controversies arising out of the same or similar behaviour. Having made the choice (or having had the choice made for it by a higher tribunal), the perceptive court will apply the rule not by rote but in the light of the rule's underlying reasons in policy. In this sense, these policy reasons play a part in the decision of even routine cases, even though the court does not establish or reconsider the basic policy reasons behind legal principles thus applied by it.

A recent appeal decided by our court may perhaps be regarded as one of those rare instances where the justice-dictated result (or, if you will, the policy-dictated result) influenced the choice of the legal theory upon which the case was decided. In *Standard Motor Car Company v. State Farm Mutual Automobile Insurance Company*,²⁴ a garageman sued to recover damages caused to his customer's car while it was entrusted to the garageman for repairs. Although the pleadings were broader, the garageman's cause of action and right to bring the suit for such damages was argued and resisted before us solely upon the question of whether he was *subrogated* to his customer's cause of action against the tortfeasor (the defendant's insured) for the tort-caused damage to the customer's vehicle.

The garageman had simply paid for the damages and returned the automobile to his customer without securing a conventional subrogation. His counsel relied upon the provision of Civil Code Article 2161 that: "Subrogation takes place of right: . . . For the benefit of him who, being bound *with* others, or *for*

on their legal 'right of way'. Legislative provisions for right of way are to facilitate the passage of traffic in this congested twentieth century world. If to accomplish this purpose, and in realization that even observing the path ahead may tax the ordinary motorists' powers of sustained observation, the legislature has relieved the motorist on the right of way street of a duty ordinarily to slow before each intersection (and, consequently, of a duty to take his attention from the path ahead by darting glances each way down the intersecting streets), appellate courts should not supply artificial standards in an unrealistic attempt to allocate damages *after* an accident has occurred." A majority of our Supreme Court is apparently in accord with the view that right of way motorists may reasonably rely upon their right of way in proceeding into intersections. *Steele v. State Farm Mut. Ins. Co.*, 235 La. 564, 105 So.2d 222 (1958); *Ryan v. Allstate Ins. Co.*, 232 La. 831, 95 So.2d 328 (1957).

24. 97 So.2d 435 (La. App. 1957).

others, for the payment of the debt, had an *interest* in discharging it." (Emphasis added.) However, a depositary such as the garageman is under no duty to repair damages caused solely (according to the allegations of the petition) by the negligence of another, the defendant's insured.²⁵ Therefore, the defendant argued with apparent justification, no legal subrogation under the code article took place in favor of the plaintiff, who was not bound "*with*" or "*for*" the defendant's insured to repair the damages caused by the latter's negligence. Accordingly, the garageman's suit must (it was argued) be dismissed, since no conventional subrogation to the customer's cause of action had been secured by the garageman at the time he paid the damages.²⁶

The court was dissatisfied with the result thus reached. As the garageman's counsel argued, the garageman was under at least a moral duty to repair his customer's vehicle before returning it, and it seemed unfair and against the ordinary sense of justice of the community to deny the garageman recovery for the repairs for which he had paid and to permit the tortfeasor upon such grounds to escape liability for these damages admittedly caused by his own negligence, when he had no essential concern as to the ownership of the automobile with which he had collided.

Since the garageman in a practical sense had an "*interest*" in repairing his customer's car if he wished to retain his customer's trade and to avoid a bad business reputation, research in the French sources of our code article was undertaken to determine whether legal subrogation was intended to occur in circumstances such as the present. The learned legal scholar whom we consulted informed us that such was not the case; but he immediately added that under the French equivalent of Civil Code Article 2134²⁷ concerning the discharge of obligations and the jurisprudence thereunder, the payment of another's debt by "a third person no way concerned in it" entitled the latter to reim-

25. LA. CIVIL CODE art. 2945 (1870): "The depositary is only bound to restore the thing in the state in which it is at the moment of restitution. Deteriorations not effected by an act of his, are to the loss of the depositor."

26. See, e.g., *Foreum-James Co. v. Duke Transportation Co.*, 231 La. 953, 93 So.2d 228 (1957); *Soileau v. Gibbs*, 229 La. 976, 87 So.2d 312 (1956).

27. LA. CIVIL CODE art. 2134 (1870): "An obligation may be discharged by any person no way concerned in it, such as a coobligor or a surety."

"The obligation may even be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that, if he act in his own name, he be not subrogated to the rights of the creditor."

bursament from the true debtor even though the third person is not subrogated to the creditor's rights against the debtor.²⁸ Therefore the garageman who had discharged the tortfeasor's debt was entitled to be *reimbursed* by the latter, even though not *subrogated* to his customer's cause of action against him.

Furthermore, once we were freed of the notion that we were concerned solely with a subrogation problem, independent research by our court discovered Louisiana jurisprudence to the effect that possessors such as depositaries have standing to sue and recover from tortfeasors damages caused by the latter, irrespective of the possessors' non-ownership of the property damaged.²⁹ Also, recovery was probably allowable under the civilian theory of negotiorum gestio.³⁰

Now it may well be argued that what this description of our process of decision in this case represents is a deficiency in initial research upon the part of counsel and the court, not the application of policy to the decision of the controversy. But to me it is at least a rough illustration of a policy-predicated result influencing the legal characterizations to be applied to decision of the case, as compared with applying legal characterizations to obtain the result. To apply the legal theory argued produced a manifestly unfair result. But, had we shrugged our shoulders and decided the case on this theory without further inquiry, our decision would have been not only inequitable, but also bad law.

This case has also seemed to me another demonstration of the principle that the thrust of the law has been and is always toward justice. Ordinarily, legal rules are enacted or develop not because of logic, but to serve needs of the community. The underlying aim of legislator and judge is to provide a general rule that upon specific application produces or permits results consistent with the community's common sense notions of what is fair and practical. When application of a rule produces an individual result manifestly unfair and unsensible, the reason may be not the unfairness of the law but its misapplication by the practitioner or judge.

The fundamental purpose of all legal systems of Western

28. *Standard Motor Car Co. v. State Mutual Ins. Co.*, 97 So.2d 435, 438-39 (La. App. 1957).

29. *Id.* at 436-38.

30. *Id.* at 439-440.

civilization is to provide just determinations for the practical disputes of mankind. This purpose is the yeast that vitalizes the otherwise inert masses of legal theories and rules. To attempt to understand or explain or apply law without reference to this underlying consideration is to miss the essence of legal systems and the judicial process. Although statutes and precedents are indeed the body of the law, "policy" — or justice — is its soul.

And thus in my opinion the law professors are correct to appreciate, and perhaps some practical practitioners wrong to discount, policy considerations as influencing judicial decisions and the judicial process.